J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 74/84

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.

BETWEEN	-	MICHAEL THOMAS	-	PLAINTIFF/APPELLANT
AND	-	JAMES ARSCOTT	-	1st DEFENDANT/RESPONDENT
AND	-	EARL PATTERSON	-	2nd DEFENDANT/RESPONDENT

Ainsworth Campbell for Plaintiff/Appellant

Ronald Williams, Q.C., and Charles Piper
for Defendants/Respondents

April 24, 25; & May 5, 1986

ROWE, P.:

Vanderpump J. assessed damages in favour of the appellant at $82,296.00 being $12,296.00 special damages and $70,000.00 general damages. More particularly, he awarded $40,000 for pain and suffering and $30,000 for loss of future earnings. The appellant who was injured on November 18, 1983 when a motor car struck him off his motor cycle, being dissatisfied with the award which he labelled as inordinately low, seeks to move the court to increase the damages to within the region of $180,000. No one seemed to have been satisfied with the award as the respondents also filed a respondent's notice complaining that the award of general damages, part of the special damages and the rate of interest, were excessive.

Dr. Dundas an orthopaedic surgeon at the Kingston Public Hospital examined and treated the appellant for his injury and he gave the medical evidence upon which the parties relied. Dr. Dundas said that the appellant suffered a serious injury and was not malingering and Vanderpump J. was not prepared to treat the injury as a mere "bad leg" case, as was suggested by Mr. Williams, whatever that term might be interpreted to mean.

Particulars of injuries as contained in the amended statement of claim, were somewhat more extensive than the evidence in proof thereof. Dr. Dundas found the appellant suffering from a 6" long 4" deep wound to the right thigh extending 3" above the knee going proximally to the hip joint in the direction of the heart upwards. The femur or thigh bone, protruded through that wound. There was no loss of circulation beyond the wound. However, due to the severe blood loss, the appellant had two units of blood transfused on November 26, 1982 from which he developed a reaction. The fracture extended to the knee joint and was described as a comminuted circular fracture. There were little fragments of bone in the wound which was contaminated and dirty. After X-rays the appellant was taken to the operating room but unfortunately the surgeon who performed the operation was not called as a witness nor were his notes admitted in evidence. A skeletal traction was applied to the injured limb on November 20 which immobilized the appellant in bed until January 24, 1983, although the traction was removed three days earlier, i.e. on January 21. During the period of his immobilization, the appellant developed a chest infection, which spread from the contaminated wound. Early treatment in hospital consisted of the administering of antibiotics and anti-tetanus drugs. Further antibiotics were prescribed to

combat the infection together with physiotherapy. On January 24, 1983, the appellant was discharged from the K.P.H. to the Lionel Town hospital for regular dressings. Thereafter he continued as an out-patient of the K.P.H.

On February 26, 1983, the plaster-of-paris cast, which presumably had been fitted during the original operation, was removed. The appellant had several X-rays as an out-patient, the last of them being in October 1983 which showed that the large segment of bone projecting from the wound was dead, but had not separated enough for safe removal. At the time of trial that dead bone had not been removed, as in the opinion of the doctor there was insufficient sub-stratum bone around it to permit safe removal.

As a result of the injury the muscles in the thigh have become somewhat stuck, i.e. tethered, to the fracture area and that has left the appellant with a lag of 20°. He cannot voluntarily stretch his knee completely nor can he flex his knee. His range is 20°-40° whereas the normal range is 0°-150° depending on the build of the person. This lack of knee movement incapacitates the appellant from using public transportation.

When the plaster-of-paris cast was removed on February 26, 1983, it was discovered that there was oozing from the original wound. On February 7, 1984, when Dr. Dundas last examined the appellant the wound was still oozing and still required dressing. This oozing was a reflection of the body's reaction to the dead fragment of bone. The appellant said in evidence that up to June 15, 1984, the right leg was "oozing infection", yellow substance which smells bad, "bad smell" and required daily dressing. Dr. Dundas said that there was no absolute guarantee that if the dead bone was removed the oozing would cease and that the appellant ran a 30% risk of recurrent infection even after the removal of the dead bone.

Dr. Dundas explained that the body builds a scaffold around a fracture site as new bone is formed. When he gave his evidence on February 22, 1984, it was his rough guess that by the end of April or in May 1984, it would be safe to perform the remedial surgery. Indeed the appellant said he was scheduled for the operation on May 17, 1984, but it had been cancelled. He had been re-hospitalized before June 15, 1984, and on leaving court on that day he would return to hospital in the hope that the operation could then be performed. Although of a remedial nature, Dr. Dundas said that the projected operations, two at the maximum, were major procedures requiring hospitalization of a week to ten days on each occasion. He did not, however, rule out the possibility that one operation only could be necessary, but an operation there would have to be, as the appellant then had a 100% disability in the right lower limb.

Measuring the disability of the appellant consequent upon his injury was an important issue at trial. Dr. Dundas began from the standpoint that there was then a 100% disability of the leg as related to the occupation of the appellant. In relation to him as a person there was a 65% - 70% disability of the right leg, and Dr. Dundas in giving this opinion satisfied the court that it was a measured range and not the product of guess-work. The leg was to be operated on. If the operation was a total success in every respect the disability would be reduced from 65% to 10% of the whole leg which would represent only the shortening of the leg which was then 3/4" and could not be improved by the surgery. The shortening was as a result of the displacement of the bone at the time of the fracture. If successful there could

be ability to bend the knee 90° and the bone could be healed without any signs of persistent inflammation there. But the doctor was of opinion that the probability was, that the appellant would end up with a 50% functional loss of the leg for the following reasons. The fracture extended into the knee joint which predisposed to permanent restriction of motion at the knee and also to the high problem of arthritic degeneration in the joint at a later date, say 5-7 years. When the bone came through it cut through some of the muscles. They were then scarred and not as elastic as normal tissue and were somewhat stuck to the fracture area. The doctor hoped to overcome by surgery the release of the tendons from tethering but even if this was achieved the lack of elasticity and the their/ scarring would compromise the pliability of those muscles. On the probabilities at best the appellant could end up with a 20% disability of the affected limb. At worst, he could end up with a stiff knee permanently and permanent infection of the bone for life amounting to a 75% functional loss of that limb.

At page 22 of the record, the learned trial judge, after having set out in extenso the evidence of Dr. Dundas, said he did not regard the instant case as a mere "bad leg" case and then went on to say:

> "Doctor said the probabilities were that he would end up with 50% functional loss of that limb. Crux was tethered muscles and the fracture extending into the knee joint causing restriction of movement, pre-disposing to permanent restriction of motion at the knee to a high probability of arthritic degeneration in the joint at a later date. Also 3/4" shortening due to displacement at the time of fracture. So Plaintiff could end up with a permanent stiff knee. This would militate against his earning a living."

The inference to be drawn from the passage quoted above is that the learned trial judge accepted the evidence of Dr. Dundas as to the 50% permanent functional disability of the appellant's right leg, and the probability that he would end up with a stiff knee. Neither counsel addressed any arguments in complaint against these findings of fact and the assessment must be governed by these findings.

The appellant gave evidence that he suffered pain from the time of the accident and up to when he was giving evidence. If he sits at one place for too long a time, he said, his leg would stiffen up and hurt, but he did not feel pain at other times. Dr. Dundas agreed that from time to time the appellant would have pains which could be controlled by medication. One result of the adverse reaction to the blood transfusion was very severe itching all over the body and bumps on his face and shoulders.

Prior to the accident the appellant was an athlete who had won a gold medal for the 800 metres and a silver medal for the 1600 metres. He was an avid footballer. He was in active training for the 1983 factory finals at the Clarendon Sugar Company. For him there will be no further participation in sports and the effect is, that he feels left out. The appellant found it difficult to climb stairs and cannot walk for any extended period without rest.

In November 1982, the appellant was a second class machinist earning an average of $117.00 per week. Due to his physical incapacity he was made redundant in March 1983, and had not worked since.

In February 1984 the appellant had a 100% physical disability in respect of his occupation as a machinist. Dr. Dundas was of the view that if the operation was wholly

successful, the appellant would be able, after a period of 6 months, to function as a machinist on par with anyone, but if he ended up with a 75% disability and there was a 15% chance of that happening, then he would recommend that the appellant change his occupation for a sedentary job. However, as of February 1984, the doctor was of the view that the appellant might have been able to do a sedentary or semi-sedentary job.

The appellant is a vegetarian. He eats fish. While he was in hospital his mother visited him travelling from Lionel Town to Kingston, and paying she said $70.00 per day for transportation by hired car. Each day she brought meals for the appellant as the hospital did not provide vegetarian dishes. When the appellant was released from hospital he went to his mother's home. There she cooked and washed for him, bathed him, gave him bed pan, as all he could do was eat. She said that the appellant paid her $80.00 weekly for these services which she had not previously performed as before the accident, the appellant had lived with the mother of his child.

Particulars of special damages were given. One item was a claim for "mother's expense to see son in hospital from 19/11/82 to the 24/1/83 - $4,011.00" and another item was "nursing care from the 25/1/83 to the 13/5/83 at $80.00 per week and continuing". Vanderpump J. disallowed both these items. In doing so he referred to the evidence of Dr. Dundas saying:

> "It must be remembered that the doctor had said that on discharge on 26/1/83 he did not require any nursing."

What in fact the doctor said was that when the appellant was discharged from hospital:

> "The only thing was that he should have dressings done at his home or at hospital nearest to him. He had to use a crutch but did not require nursing."

The learned judge found that the appellant's mother lost no income as she continued to operate her spirit licensed business. He queried whether this mother who had visited her son daily while he was in hospital in Kingston at some expense to herself, because she so loved him, would expect the defendant to pay her like a servant for ministering to the appellant's daily wants afterwards at her home. In two terse sentences, he dismissed the claim saying:

> "It was only her duty as a mother
> She cannot recover."

A person who is hospitalized in Jamaica whether in a public or private institution has the personal responsibility to launder his or her own clothes. It is commonplace for such a patient to provide his own linen and to launder them. A claim for laundry is a perfectly legitimate one and when made and proved ought to be allowed. A person who is a vegetarian ought not to be compelled to have meat dishes when he is confined to hospital and if he has to incur additional expense to provide vegetarian meals, when such services are claimed and proved they ought to be allowed in damages. If in the instant case, the court accepted that the appellant's mother travelled to Kingston to bring fresh clothing and fish dishes for the appellant, then reasonable travelling expenses ought to have been allowed.

Mr. Williams submitted that the learned trial judge was correct when he rejected the claims for the mother's travelling and for her services to the appellant at home. He said that the appellant had to prove that there existed a legal duty on him to reimburse the mother for her expenses before he can recover any expenses incurred by the mother. For authority he based himself upon the passage which appears at para. 1136 under the sub-title "Assistance rendered gratuitously by private third parties" in the thirteenth edition of McGregor on Damages published in 1972. As will be seen Donnelley v. Joyce, infra

was decided in 1973. I think that Mr. Williams stated the principle too narrowly and that the true rule is that adopted by this court in Frank Coleman v. Donald McDonald and Carol Smyth [1979] 28 W.I.R. 137.

That was a case in which the plaintiff, a Canadian citizen, was injured in a motor vehicle accident in Grand Cayman. Her medical and hospital bills amounting to Can. $9,365.14 were paid by the Ministry of Health of the province of Ontario under the Ontario Health Insurance Plan. Judgment was given in favour of the plaintiff and included a sum for medical expenses on the understanding that this money was to be held in trust for the insurers. On appeal it was contended that as the plaintiff did not pay these medical and hospital bills herself out of her own pocket in the first place, but that some one else paid them for her, the plaintiff was not entitled to recover them as they were not a loss that she had incurred. In a long and very careful judgment, Carberry, J.A. reviewed all the cases including Schneider v. Eisovitch [1960] 2 Q.B. 430; [1960] 1 All E.R. 169; Dennis v. L.P.T. Board [1948] 1 All E.R. 779; Watson v. Port of London Authority [1969] 1 LL.L.R. 95 and Cunningham v. Harrison [1973] 3 All E.R. 463. The learned Judge of Appeal adopted the reasoning and the decision in Donnelley v. Joyce [1973] 3 All E.R. 475; [1973] 3 W.L.R. 514, the headnote of which taken from the All England Report reads:

> "In an action for damages for personal injuries incurred in an accident, a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided was irrelevant; the plaintiff's loss was the need for those services, the value of which, for the purpose of ascertaining the amount of his loss, was the proper and reasonable cost of supplying the plaintiff's need.

> "It followed therefore that the defendant was liable to the plaintiff for the cost of the mother's services, i.e. her loss of wages, necessitated by the defendant's wrongdoing (see p. 478 j, p. 480 b and h, p.481 d and e, p.482 a and p.484 g, post).
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> Roach v. Yates [1937] 3 All E.R. 442 and Liffen v. Watson [1940] 2 All E.R. 213 applied. Dictum of Paull J in Schneider v. Eisovitch [1960] 1 All E.R. at 174 approved.
> Haggar v.de Placido [1972] 2 All E.R. 1029 disapproved. "

Near the end of his judgment he said:

> "We would respectfully agree with the judgment of the Court of Appeal given by McGaw L.J. and would adopt as our own his closing remarks.
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> 'In our judgment, the loss here in question on principle and authority, was the plaintiff's loss. (She) is entitled to recover damages in respect of the fair and reasonable cost of the special attention, necessitated by the defendant's wrong doing. The fair and reasonable cost is the amount awarded by the judge .....' "

However, the case of Coleman v. McDonald, supra, has not received the attention that it deserves. As Carberry J.A. did, in the Coleman case supra, so I will do in the instant case, by referring to a passage from the judgment of McGaw L.J. in Donnelley's case at p. 479H - 480E of the Report:

> "Counsel for the defendant's first proposition is that a plaintiff cannot succeed in a claim in relation to someone else's loss unless the plaintiff is under a legal liability to reimburse that other person. The plaintiff, he says, was not under legal liability to reimburse his mother. A moral obligation is not enough. Counsel for the defendant's second proposition is that if, contrary to his submission, the existence of a moral, as distinct from a legal, obligation to reimburse the benefactor is sufficient, nevertheless there is no moral obligation on the part of a child of six years of age to repay its parents for money spent by them, as in this case.

> "We do not agree with the proposition, inherent in counsel for the defendant's submission, that the plaintiff's claim, in circumstances such as the present, is properly to be regarded as being, to use his phrase, 'in relation to someone else's loss', merely because someone else has provided to, or for the benefit of, the plaintiff - the injured person - the money, or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages - for the purpose of the ascertainment of the amount of his loss - is the proper and reasonable cost of supplying those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.
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> "Hence it does not matter, so far as the defendant's liability to the plaintiff is concerned, whether the needs have been supplied by the plaintiff out of his own pocket or by a charitable contribution to him from some other person whom we shall call the 'provider'; it does not matter, for that purpose, whether the plaintiff has a legal liability, absolute or conditional, to repay to the provider what he has received, because of the general law or because of some private agreement between himself and the provider; it does not matter whether he has a moral obligation, however ascertained or defined, so to do. The question of legal liability to reimburse the provider may be very relevant to the question of the legal right of the provider to recover from the plaintiff. That may depend on the nature of the liability imposed by the general law or the particular agreement. But it is not a matter which affects the right of the plaintiff against the wrongdoer."

Had Vanderpump J's attention been directed to the above authorities, it is unlikely that he would have dismissed the claim for special damages under the two heads of expenses incurred by the mother or the mother's entitlement to recover for the special services she rendered to the appellant while he was recuperating at home.

There was a claim for loss of earnings in the particulars of special damages. It was put thus:

> "Loss of earnings from the 18/11/82 to the 13/5/83 at $160 per week and continuing - $3,840."

It was proved in evidence that the loss of earnings continued right up until the day of trial. The learned trial judge reserved judgment on June 15 and delivered his judgment on October 18, 1984, some four months later. As to this award, Mr. Campbell complained on appeal that the trial judge erred in restricting the period to June 15, 1984 and it ought properly to extend to the date of judgment. Mr. Williams attacked this award from quite a different angle. He said that on the pleadings the sum claimed was $3,840 and unless there was an amendment to those pleadings, the appellant was not entitled to any greater sum. He relied on the decision in Ilkiw v. Samuels [1963] 1 W.L.R. 991 and in particular the dictum of Goddard L.J. at 1006, that:

> "As regards the question of damages, I would put it in this way. Special damage, in the sense of a monetary loss which the plaintiff has sustained up to the date of trial, must be pleaded and particularised. In this case it was so pleaded and particularised at the sum of ≠77 odd. Shortly before the trial, the special damage (as so particularised) was agreed at ≠77 by letter. In my view, it is plain law - so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years - that you can recover in an action only special damage which has been pleaded, and, of course, proved. In the present case, evidence was called at the trial the effect of which was that the plaintiff has sustained special damage of a very much larger sum, amounting, I think it would work out at, to something like ≠2,000 - at any rate, a very much larger sum than ≠77. This was not pleaded, and no application to amend the statement of claim to plead it could be made because of the agreement already arrived at, at the sum of ≠77 for special damage. The evidence about the loss of earnings in excess of ≠77 was admissible, not as proof of special damage (which had not been pleaded) but as a guide to what the future loss of earnings of the plaintiff might be.

Vanderpump J. distinguished the instant case from that of Ilkiw v. Samuels supra on the ground that in the latter case the particulars did not contain the phrase "and continuing". When Mr. Williams raised his objection in the court below, Mr. Campbell did not seek to amend his statement of claim to reflect the larger sum proved for loss of earnings. In argument, the court asked Mr. Williams what would be his position if the Court of Appeal had the same powers of amendment as the court below. He declined to deal with the question then, stating that he would reserve his opinion for the time when, if at all, such an application was before the court. No such application was made, notwithstanding the provisions of Rule 18 (1) of the Court of Appeal Rules which provide:

> "In relation to an appeal the court shall have all the powers and duties as to amendment and otherwise of the Supreme Court."

In my opinion special damages must both be pleaded and proved. The addition of the term "and continuing" in a claim for loss of earnings etc. is to give advance warning to the defendant that the sum claimed is not a final sum. When, however, evidence is led which established the extra amount of the claim, it is the duty of plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum. The argument mounted by Mr. Campbell itself shows the necessity for quantification and amendment. He contended before us that the period of the award was too short, but if he had applied for and was granted an amendment he would have known exactly what sum the plaintiff was claiming for special damages. It would have been clear to him that any sum for any period other than that ascertained and pleaded would fall to be general damages and not special damages. The learned trial judge was not entitled

to award for loss of earnings a sum in excess of $3,840 and his award for special damages must be reduced from $9,369 to $3,840.

I now turn to the question of general damages. The learned trial judge awarded $40,000 for pain and suffering and $30,000 for loss of future earnings. Mr. Campbell challenged both awards on the grounds that they were unduly conservative, that the trial judge failed to take into consideration relevant evidence which impinged upon the question, e.g. loss of amenities, and that the multiplier of 5 years for a man of age 26 years was wrong in principle. The proper range, he said, should be 10-14 years. In support of his respondent's notice Mr. Williams argued that the evidence did not warrant a multiplier of more than 2 years at the upper end but in all the circumstances the proper multiplier was but one year. Mr. Williams urged the court to say that the appellant had placed the trial judge in a most unfortunate position because he had brought on his case to trial before his future physical condition could be determined with reasonable assurance.

Damages both past and prospective must be assessed at one time. The appellant was scheduled for corrective surgery in March 1984. It did not take place. When it transpired during the course of his evidence that the appellant was imminently due for an operation, the defence suggested that the case be adjourned until the result of the operation be known. This the appellant, for what we were told were economic reasons, declined to do. That simple device would probably have brought him his reward much earlier as there might not have been the necessity for review on appeal. Since the burden of proof is upon the appellant, he cannot benefit from anything which is in the realm of speculation.

Counsel drew the attention of the court to a series of awards made in Jamaica between 1978 and 1982, all to be found in Khan's Recent Personal Injury Awards. Simpson v. Harris et al, (C.L. 1978) S.068 at p. 37 decided by Carey J. (as he then was) n July 26, 1978, concerned a man aged 25 years who sustained a 6" gaping laceration on the lateral aspect of the right thigh and a compound fracture of the right thigh. He was admitted to hospital for 3 days and an above the knee plaster was applied after reduction of the fracture under general anaesthetic. The plaster cast remained from 16/2/77 until 16/5/77. There was a thickening of the right leg and risk of exacerbation due to infection to bone of right lower leg and possibility of periods of drainage from time to time throughout his life. There was in fact no drainage at the time of trial. Carey J. awarded $16,000 for pain and suffering and loss of amenities.

The injuries recounted above in Simpson's case are considerably less serious than those of this appellant. Simpson's disability was 10%: this appellant's 50%.

Thomas v. Lewis et al C.L. 1978 T.001 p.45, decided by Wright J. on June 24, 1980, was that of a male aged 65, who suffered a severe contusion of left thigh with fracture and a fracture of the middle third of the right femur. He was hospitalized for 106 days from July 21, 1976. A Steinman's pin was inserted into the upper end of the right tibia and traction was applied. This was retained until September 21, 1976 when skin traction was substituted for skeletal traction. His disability included 3/4" shortening of right leg, some muscle wasting of right thigh, a 20% limitation of flexion of right knee, all movement of right hip restricted by about 10°, he walked with an obvious limp. Permanent partial disability assessed at 15% - 20%. The award for pain and suffering and loss of amenities was $30,000.

I would consider that the injuries in the instant case are less than those suffered by Thomas.

I do not regard the facts in Tomlinson v. Chambers p. 47 as comparable with the instant case as those injuries were demonstrably considerably more serious. Nor do I regard as helpful the cases of Daley v. Lawson p. 21, which concerned pelvic and ankle injuries, and that in Peddie v. Porteous et ux C.L. 1975 P.075, p.27; decided on March 8, 1978, which did not involve fracture of the femur.

A significant case of much similarity to the instant appeal is that of Graham v. Ellis C.L. 1976 G.148 p.57 decided by Wright J. on January 7, 1981. The plaintiff, a 43 year old plumber, was injured in a motor vehicle accident on February 8, 1972. He suffered a compound comminuted fracture of the upper 1/3rd of the right tibia and fibula extending into the knee joint and an 8" laceration over front of leg exposing the bone and a 2" laceration over the left calf. He was hospitalized for one week, discharged, and re-admitted one week later. He was re-admitted on two further occasions and remained in hospital for a total of six months. During an operation on November 20, 1972, dead bone was removed from the leg. On 31/5/73 his cast was removed. He was re-admitted to hospital on October 31, 1973, with a fracture of the lower end of femur. On November 29, 1974, more dead bone was removed. Permanent partial disability was assessed at 30% of the right lower limb. The award is intriguing. Special damages were $28,122.04 which included loss of earnings for 422 weeks. The general damages were $45,000 made up of $25,000 loss of future earnings. $5,000 loss of earning capacity and $15,000 for pain and suffering.

The award of $15,000 for pain and suffering cannot be accepted as a standard by which other awards can be measured. The injured man was in and out of hospital from February 8, 1972 to November 29, 1974 a period of 1 year and 8 months. He was

in plaster cast presumably from his re-admittance to hospital in February 1972 until the cast was removed on May 31, 1973. Presumably also, the second fracture for which he was hospitalized in October 1973 was directly attributable to the February 1972 injury. The award for pain and suffering was miserly and I will not be guided, as Mr. Williams recommends, thereby.

Of the cases cited to us, the one which seems to me to be of the most persuasive value is that of Carey J. in Simpson v. Harris supra. The residual disability of the appellant was greater in that he has a 3/4" shortening of the leg, walks with a pronounced limp, has drainage from the wound and has a 50% permanent partial disability of the affected limb. Applying the decision of the court in Central Soya of Jamaica Ltd. v. Junior Freeman, C.A. 18/84, (unreported) the appellant is entitled to have judgment in the money of the day, which on the analysis given in the Central Soya case, would be about double what was awarded in a comparable case in 1978. Making allowance for the greater severity of the appellant's injuries and the more extensive disability, than that in existence in Simpson v. Harris supra, I am of the view that the sum of $40,000 for pain and suffering was a fair and reasonable award and ought not to be disturbed. I say this notwithstanding the fact that the learned trial judge made no specific reference to the loss of amenities suffered by the appellant, as when fairly read, the passage in his judgment at p. 22 of the record, "I don't recall any loss of amenities" do not refer to the instant case but rather to a decided case quoted to him by Mr. Williams.
It is unfortunate that he did not use the hallowed phrase "pain and suffering and loss of amenities" but in this case the award mut have taken loss of amenities into consideration.

What sum should be awarded for loss of future earnings? The appellant lost his job as a result of his incapacity. No evidence was led as to his chances of promotion, had his employment not been terminated nor was there any evidence as to the prospect of his finding a similar job should he recover sufficiently to be able to return to that form of occupation. If the appellant is to work at a sedentary job, for what type of employment is he suitable? Will he require re-training? All these are imponderables which could have been addressed by evidence.

Up to the time of trial the appellant had not been responding favourably to treatment. If there were to be two operations what would be the period separating them and from what time would the six month period of recuperation begin? If as in Simpson's case the removal of dead bone became a protracted situation, then the period when the appellant would be out of work would be prolonged. The learned judge was faced with a particular difficulty in determining the multiplier and it appears to me that he was impressed with the age of the appellant and the extent of the permanent partial disability in arriving at the five year multiplier. I do not think that he was in error and I would not disturb his award for loss of future earnings.

The rate of interest awarded by the learned trial judge must be reduced to 3% for both special damages and general damages following the decision of the court in Central Soya of Jamaica Ltd. v. Freeman, supra.

The appellant was entitled to an amount for the expenses incurred by his mother and for payments made to her. In the absence of agreement between the parties, I would allow 1 trip by car, 3 trips by bus in every 7 days from 20/11/82 - 24/1/83, and extra help 25/1/83 - 13/5/83 at $40 per week. In all other respects I would dismiss the appeal. In relation to the respondent's notice I would vary the award as to loss of earnings by reducing it to $3,840 and I would reduce the interest rate to that of 3% per annum. Each party should have one half of its costs to be agreed or taxed.

CAREY, J.A.:

I entirely agree.

ROSS, J.A.:

I agree.